

STATE OF MICHIGAN
COURT OF APPEALS

CHRISTOPHER J. DILIBERTI and SUSAN
DILIBERTI,

UNPUBLISHED

Plaintiffs-Appellants,

v

No. 190260
Macomb Circuit Court
LC No. 92-003807 NH

DR CRAIG ESSEX, D.O., and ST. JOSEPH
HOSPITAL CENTERS, an assumed name of
MERCY MOUNT CLEMENS CORPORATION,

Defendants-Appellees.

Before: Griffin, P.J., and Gribbs and Talbot, JJ.

GRIFFIN, P.J. (dissenting).

In section II B the majority holds that the lower court committed error requiring reversal by allowing defense counsel to impeach plaintiff's expert, Dr. Emanuel Tanay, with the facts regarding Dr. Tanay's prior conduct in the case of *People v McPeters*, 181 Mich App 145; 448 NW2d 770 (1989). I respectfully disagree and therefore dissent.

A careful review of the record reveals that immediately prior to the cross-examination of Dr. Tanay, a discussion occurred regarding whether the court would allow defense counsel to ask questions concerning *People v McPeters*. After hearing arguments, the Honorable Michael D. Schwartz deferred ruling on the matter:

The Court: . . . Now, depending upon circumstances, I may let it in; I may not let it in. It depends upon the circumstances. Now, cross-examination has to do with credibility and impeachment, and if it's any of those factors, I may let it in. I don't know how it is going to come in or anything like that.

Near the conclusion of his cross-examination, Dr. Tanay, himself, brought up the subject of *People v McPeters*. The following colloquy occurred between defense counsel and Dr. Tanay without objection until the end:

Q. Has it been your practice to testify for free?

A. No, it is not my practice to testify for free, but I have testified in court appointed cases where my fee was not even covering my expenses.

Q. Has that always been your practice?

A. No, I select where I choose to testify either for free, which is not often, or where I choose to testify for a fee that is not even covering my overhead.

Q. But if a case presented in which you were required to testify, have you ever refused to testify for what the court set your fee at?

A. No, I have not. I have complied with the opinion of appellate court which said that I could not be coerced into that. There was a situation that *McPeters* case where I did comply with –

Mr. Boyer (plaintiffs' counsel): Yes, Your Honor.

The Court: I want to see both attorneys up here, please.

After Dr. Tanay's testimony that he had never refused to testify for a court-set expert witness fee, and his volunteered response that in the *McPeters*' case he had complied with the court's directive, defense counsel requested permission to impeach the witness with the facts of *McPeters*. Defense counsel argued, in part, as follows:

Mr. Valitutti (counsel for defense): . . . He [Dr. Tanay] has now answered questions indicating that he has never refused to testify for a court-set fee, and this case *People versus McPeters* clearly sets forth, is evidence of the fact that he did in fact do just that.

After hearing arguments, the court exercised its discretion by permitting defense counsel to ask Dr. Tanay certain questions regarding the case of *People v McPeters* for impeachment purposes only:

The Court: . . . The Court will conclude that Mr. Valitutti may ask the doctor certain questions with regard to *McPeters*. I will limit him in his questions. It is used for impeachment purposes, which falls right within MRE 613, and character is not before us at all. And I will not permit anything with regard to character. He made a statement with regard to testifying in the other case and he has the right to contradict him on that statement alone. I won't go into anything else. That's it.

In my view, Judge Schwartz' ruling that allowed limited questioning of Dr. Tanay for purposes of impeachment, only, was not an abuse of discretion. The interest, bias, or prejudice of a witness, including an expert witness, is a proper subject of cross-examination. MRE 611(b); *Wischmeyer v Schanz*, 449 Mich 469, 474-475; 536 NW2d 760 (1995); *Wilson v Stilwill*, 411 Mich 587; 309

NW2d 898 (1981). The scope and duration of cross-examination rests in the sound discretion of the trial court. *Id.* However, the trial judge should exercise his discretion by limiting questioning which seeks to harass, intimidate, or belittle a witness. *Id.*

The relevant facts of *McPeters* are set forth *supra* at 149:

In August of 1983, Dr. Tanay contacted defendant's appointed counsel and informed him that his fee would be \$100 per hour for evaluation, testimony and preparation of defendant's case. Tanay asked defense counsel to secure a court order appointing him as an expert witness and providing for his requested fee. When defense counsel failed to secure an order providing for the requested fee, Dr. Tanay informed defense counsel and the court that he had no independent recollection of defendant's case and that he would not prepare or testify unless paid his requested fees.

Defense counsel moved for expert witness fees over and above allowable scheduled fees to pay for Dr. Tanay's testimony. The court denied the motion and ordered that Tanay be paid \$353.60 for a trial appearance. The court also ordered that subpoenas be served upon Tanay ordering him to appear. This resulted in a deplorable *intervenire* which obscured the main event.

When subpoenaed, Tanay stated that he had no recollection of anything pertaining to defendant's case and asked the court to release him as an expert witness. The court refused because it was not practical to secure another expert witness for defendant that late in the proceedings. At trial, Dr. Tanay testified that he did not remember examining defendant. After defense counsel attempted to refresh Tanay's memory with his written report, Tanay still asserted he had no recollection of the case. Out of the presence of the jury, defense counsel, in order to refresh Tanay's memory, played tape recordings made by Tanay when he interviewed defendant. Tanay refused to listen to the tapes, at one point covering his ears with his hands.

In the present case, it was Dr. Tanay who first brought to the jury's attention the *McPeters* case. In addition, it was Dr. Tanay's unobjected-to statement that he had never refused to testify for a court-established fee that made the impeachment of his statements relevant and material to his credibility. The allegedly false testimony related to the financial interest, motivation, and bias of the witness. The apparent perjury by Dr. Tanay that monetary considerations did not, and had never, influenced his testimony would have remained unrebutted had the trial court not permitted cross-examination. Under these facts, I find no abuse of discretion in the evidentiary rulings. *Wischmeyer, supra; Wilson, supra.*

In addition, even assuming arguendo that the trial judge abused his discretion by permitting overly broad cross-examination, I would find this sole allegation of error to be harmless. MCR 2.613(A)¹; MRE 103(a)². As our courts have held in the context of more highly

scrutinized criminal cases: “We require a fair trial, not a perfect trial.” *People v Beach*, 429 Mich 450, 491; 418 NW2d 861 (1988). See also *Delaware v Van Arsdall*, 475 US 673, 681; 106 S Ct 1431; 89 L Ed 2d 674 (1986). Under the overall circumstances of this eight-day trial, plaintiffs received a fair trial.

I agree with the majority as to the other issues and join in all sections of the majority’s opinion with the exception of section II B.

I would affirm.

/s/ Richard Allen Griffin

¹ MCR 2.613(A) provides:

(A) Harmless Error. An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

² MRE 103(a) provides:

(a) *Effect of erroneous ruling.* Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . .